No. 89-152

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VERA M. ENGLISH,
Petitioner,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER VERA M. ENGLISH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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ARGUMENT

I. THE ANTECEDANTS TO SECTION 210 SHOW THAT IT IS NOT A NUCLEAR SAFETY STATUTE

The fundamental premise of Respondent's argument is that Section 210 is inextricably and specifically tied in to "the comprehensive federal regulatory scheme to protect nuclear health and safety." (Respondent's Brief, p. 8). In contrast, the lower courts concluded that the statute was primarily one involving employment relations and that ". . . employee protection was the paramount congressional intent." (Pet. App. 19a) The lower courts

were thus ". . . unconvinced . . . that Congress intended Section 210 to be a regulator of nuclear safety and therefore preemptive under *Pacific Gas & Electric [v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983)]" (Pet. App. 18a) On this pivotal point Respondent states that "the district court simply erred. . . ." (Respondent's Brief, p. 26)

To support its "nuclear safety" argument, Respondent relies on the "structure" of Section 210, referring to its short time frames of 30 days for filing claims and 90 days for the Secretary of Labor to issue a decision (See Respondent's Brief pp. 8, 9-10, 17, 21-22), the exclusionary provision of Section 210(g) for employees who deliberately engage in violations of the Atomic Energy Act (Respondent's Brief pp. 8, 10, 22, 23), and the provision in Section 210 (d) authorizing the Secretary to seek exemplary damages only in a suit commenced to enforce the Secretary's order. (Respondent's Brief pp. 18, 23) Respondent suggests from this "structure" that Section 210 is a carefully reasoned act of Congress specially tailored to the concerns of nuclear safety:

> Moreover, the structure of Section 210 confirms what the legislative history makes plain, which is that Congress viewed employee protection in the nuclear context not simply as an end in itself, but as a *means* to the ultimate end of enhancing nuclear safety. For example, if employee protection were the only significant purpose for Section 210, then the requirement that any complaint be brought within 30 days of the alleged violation would seem unnecessarily strict. But this short time-requirement makes perfect sense given the broader recognition, explicit in the NRC regulations, that the fact of employer retaliation is itself a serious safety concern.

(Respondent's Brief pp. 21-22) (emphasis in original). And, with respect to the "structural import" of the exclusionary provision which Respondent says was "so carefully built into subsection [210](g)," (*Id.* p. 23) Respondent states:

> The inclusion of subsection (g) alone establishes that Congress intended Section 210 to operate as *an integral part of the system of exclusive control over nuclear safety.*

(*Id.* p. 23) (emphasis added).[1]

In fact, none of the provisions in Section 210 relied on by Respondent have anything to do with nuclear safety. Rather, as the title of Section 210 makes plain, "Employee Protection" was the focus of Congress' concern, and the provisions embodied in Section 210 were adopted wholesale from the "employee protection" provisions of other "whistleblower" acts previously adopted by Congress.

First of all, Section 210 was neither included in the Atomic Energy Act when originally enacted in 1954, nor was it part of the re-structuring which accompanied passage of the Energy Reorganization Act of 1974. Rather, Section 210 was adopted as part of the Nuclear Regulatory Commission authorization bill for fiscal year 1979, P.L. 95-601, November 6, 1978.

Secondly, as set forth in the legislative history, Section 210 was patterned after employee protection provisions in the Federal Water Pollution Control Act, 33 U.S.C. Section 1367, and the Clean Air Act, 42 U.S.C. Section 7622, as well as ". . . a similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners." Senate Report 95-848, 95th Cong., 2d Sess., at p. 29.[2] In spite of the fact that none of these acts

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[1] Respondent thus concludes that a state tort action "stands as an obstacle to the full achievement of Congress's objectives in *regulating the safety and operations of nuclear facilities.*" (emphasis added) (See Respondent's Brief pp. 38, 40-41, 42).

[2] The employee protection acts adopted by Congress prior to enacting Section 210 are as follows: Coal Mine Safety and Health

involve nuclear safety, two of them have provisions requiring that an administrative charge be filed within 30 days of the discrimination [33 U.S.C. 1367(b); and 42 U.S.C. 7622(b)(1)], and one of them requires the charge to be filed within 60 days. 30 U.S.C. 815(c)(2).[3] In addition, the Clean Air Act also has a provision requiring a decision by the Secretary within 90 days. 42 U.S.C. 7622(b)(2)(A).[4]

Similarly, just as Section 210(g) excludes persons who deliberately violate the requirements of the statute, the Water Pollution Control Act provides at 33 U.S.C. 1367(d):

> This section shall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title, standards of performance under section 1316 of this title, effluent standard, prohibition or pretreatment standard under 1317 of this title, or any other prohibition or limitation established under this chapter.

A corresponding provision is found in the Clean Air Act at 42 U.S.C. Section 7622(g):

> Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.[5]

And, with respect to judicial enforcement, the Clean Air Act contains language identical to that found in Section 210(d)—allowing the Secretary to seek exemplary damages even though that remedy in not authorized at the administrative level. Thus, 42 U.S.C. Section 7622(d) provides:

> In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

Hence, rather than being tailored for nuclear safety concerns, the provisions relied upon by Respondent to show that Section 210 is an integral component of nuclear safety regulation turn out to be lifted, essentially verbatim, from the employee protection acts that Congress had passed in the years immediately preceeding the enactment of Section 210. As shown by its legislative history, Section 210 was treated as "non-controversial", precisely because it mirrored, in virtually identical language, what Congress had previously enacted. Thus, to whatever extent the limited time frames, exclusionary provision, and exemplary damage subsections of Section 210 could be deemed as carefully considered choices on the part of Congress, those choices reflect nothing more than

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Act, 30 U.S.C. 815(c), P. L. 91-173, December 30, 1969; Water Pollution Control Act, 33 U.S.C. 1367, P. L. 92-500, October 18, 1972; Safe Drinking Water Act, 42 U.S.C. 300j-9, P. L. 93-523, December 16, 1974; Toxic Substances Control Act, 15 U.S.C. 2622, P. L. 94-469, October 11, 1976; Solid Waste Disposal Act, 42 U.S.C. 6971, P. L. 94-580, October 21, 1976; Surface Mining Act, 30 U.S.C. 1293, P. L. 95-87, August 3, 1977; Clean Air Act, 42 U.S.C. 7622, P. L. 95-95, August 7, 1977.

[3] In fact all of the employee protection acts enacted prior to Section 210, except the Mine Safety and Health Act, have the same 30 day deadline found in Section 210. *See*, 42 U.S.C. 300j-9(i)(2)(A); 15 U.S.C. 2622(b)(1); 42 U.S.C. 6971(b); 30 U.S.C. 1293(b).

[4] A requirement for a decision by the Secretary within 90 days is also found in the employee protection provisions of the Mine Safety and Health Act, 30 U.S.C. 815(c)(3), the Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(2)(B), and the Toxic Substances Control Act, 15 U.S.C. 2622(b)(2).

[5] The following employee protection acts also have exclusionary provisions essentially identical to Section 210(g): the Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(6), the Toxic Substances Control Act, 15 U.S.C. 2622(e), and the Solid Waste Disposal Act, 42 U.S.C. 6971(d).

a historically consistent practice of dealing with matters of administrative efficiency common to all employee protection statutes, irrespective of whether the regulated field touches upon the safety of mine workers, nuclear employees, the air, water or the general public.[6]

II. THE LOWER COURTS ADDRESSED THE RULING IN *FARMER* IN A FEDERAL, AND NOT A STATE CONTEXT

On two occasions, Respondent asserts that the lower courts made a determination, under North Carolina law, that Ms. English's infliction of emotional distress claims were essentially entirely covered under Section 210 through correct application of "the labor preemption analysis enunciated in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977)." (Respondent's Brief pp. 28, 46-48) A review of the relevant provisions of the district court decision shows that Judge Dupree understood the holding of *Farmer*, but incorrectly failed to permit it to operate in the context of a state action.

In *Farmer*, a tort action for intentional infliction of emotional distress was allowed to proceed in the face of facts involving unfair labor practices over which the National Labor Relations Board had exclusive jurisdiction. As Respondent points out, in that decision, this Court indicated that the tort claims must be based on actions different from, or more extreme than the events that constitute "normal" unfair labor practice charges.

> . . . it is essential that the state tort be either unrelated to employment discrimination or a function of the *particularly abusive manner* in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Farmer, *supra*, at 305. (Emphasis added.)

The portion of Judge Dupree's decision relied-upon by Respondent is found at page 28a of the Appendix to the Petition. There Judge Dupree specifically addressed the holding in *Farmer* that there is "no federal protection offered by the NLRA against a union's outrageous conduct," and hence, a state claim for emotional distress to redress such outrageous conduct will not be preempted. Notwithstanding this clear holding, Judge Dupree concluded that the entirety of Mrs. English's concededly "valid cause of action [under North Carolina law]" (Pet. App. 27a) was preempted because, in his view, the conduct complained of concerned "terms, conditions, or privileges of employment" for which section 210 provided a remedy.

It is apparent that Judge Dupree's approach denied Mrs. English the right, contemplated and assured by *Farmer*, to have her allegations of "particularly abusive" or outrageous conduct evaluated against North Carolina's legal standards applicable to the tort of intentional infliction of emotional distress. Instead of following that mandate of *Farmer*, Judge Dupree essentially stripped from Mrs. English's valid state claim each allegation of abusive and outrageous conduct, one by one; and of what remained, Judge Dupree treated as merely outgrowths or functions of defendant's acts of discrimination. Such an approach, we submit, represents an incorrect application and distortion of the labor preemption analysis enunciated in *Farmer*.

III. FEDERAL REMEDIES ARE PRESUMED TO SUPPLEMENT RATHER THAN SUPPLANT STATE-CREATED RIGHTS

This Court has recently, again, addressed the interaction of state and federal remedies. *Adams Fruit Company, Inc. v. Ramsford Barrett*, 58 U.S.L.W. 4367 (March 21,

[6] Respondent's argument about the existence of provisions allowing exemplary damages in two other employee protection statutes is equally unpersuasive. (See Respondent's Brief pp. 23, n.15, and 42) A much more plausible explanation is the general *ad hoc* nature of this legislation. (See Brief of Government Accountability Project pp. 18-19).

1990). There, in construing a specific remedial provision, this Court cautioned that one must follow the ". . . basic principles of statutory construction that require giving effect to the meaning and placement of the words chosen by Congress" (Id. at 4368). It then concluded that both the state and federal remedies were available to the plaintiffs, because ". . . federal rights should be regarded as supplementing state-created rights unless otherwise indicated." Id. at 4369.

Contrary to Respondent's characterization, we have demonstrated in Point I, above, that Section 210 was clearly never perceived by Congress as anything other than labor relations statute. Thus the admonition in *Adams Fruit* that federal remedies are to be regarded as supplementing rights created by the states is particularly compelling, especially in light of this Court's rulings that pre-emption of state remedial legislation in the employment area is not to be lightly inferred, given that such remedies fall within the traditional police powers of the states. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ——, 96 L.Ed.2d 1, 17 (1987).[7]

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[7] To infer pre-emption would leave employees with a remedy that is, in most respects, both substantively and procedurally inferior to the tort action. Not only does Section 210 deprive employees of full compensation and punitive damages, it also takes away the fundamental right guaranteed by the Seventh Amendment to a trial by jury. *Teamsters Local No. 391 v. Terry*, 58 U.S.L.W. 4345 (1990); *Lytle v. Household Manuf. Inc.*, 58 U.S.L.W. 4341 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ——, 109 S.Ct. 2782 (1989). Of perhaps even more significance, an employee in an administrative proceeding does not have the right to obtain necessary witnesses and documents through enforceable subpoenaes, because of the lack of any statutory authority from Congress in Section 210, authorizing the issuance of subpoenaes. *See, McCuistion v. Tennessee Valley Authority*, 89-ERA-006 (Order of February 28, 1983); *Billings v. Tennessee Valley Authority*, 87-ERA-5 (Order of March 28, 1988); and *Bohan v. Tennessee Valley Authority*, 87-ERA-28 (Order of October 30, 1987). See, generally, *United States v. Allis-Chalmers Corp.*, 498 F. Supp. 1027 (E.D.Wis. 1980).

CONCLUSION

For the reasons contained herein, those previously submitted by Petitioner, and those contained in the briefs of *Amici* in support of Petitioner, this Court should conclude that Section 210 of the Energy Reorganization Act is not a nuclear safety act, and that it does not have preemptive effect upon, or otherwise preclude Petitioner from proceeding with, her state common law claim for intentional infliction of emotional distress.

This the 18th day of April, 1990.

Respectfully submitted,

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